No. 14722

In the

United States Court of Appeals

For the Ninth Circuit

TERESA E. EASTMAN, Administratrix of the estate of ERIC GUNNER EASTMAN, deceased, or individually as his surviving widow, *Appellant,*

vs.

SOUTHERN PACIFIC COMPANY, a corporation, *Appellee.*

APPELLEE'S BRIEF

Appeal From The United States District Court
For The District of Oregon

HONORABLE GUS J. SOLOMON, District Judge

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JURISDICTION

This is an action for damages brought in the United States District Court for the District of Oregon by appellant, a citizen of Oregon, as administratrix of the estate of Eric Gunner Eastman, deceased, or individually as his surviving widow, against appellee railroad, a Delaware corporation and employer of the deceased at the time of his death. Recovery was sought under the Federal Employers' Liability Act, 53 Stat. 1404, 45 U.S.C.A.

; the Oregon Employers' Liability Law, ORS 654.305 eq.; and the Oregon Workmen's Compensation Law, S 656.002 et seq. The amount in controversy, exclu- of interest and costs, exceeds $3,000.00 (Tr. 3-13).

Appellant has appealed from the final judgment of District Court, entered in favor of appellee, follow- a jury verdict for appellant and the subsequent ing aside of such verdict upon appellee's motion judgment notwithstanding the verdict (Tr. 17-20).

The District Court acquired jurisdiction under 62 . 989, 45 U.S.C.A. §56, and 62 Stat. 930, 28 U.S.C.A. 32. This court acquired jurisdiction under 62 Stat. , 28 U.S.C.A. §1291.

APPELLEE'S STATEMENT OF THE CASE

Appellee adopts appellant's statement of the question ented upon this appeal (Appellant's Br. 3):

> "The question presented for review on appeal is whether or not the defendant was negligent in any particular charged and whether or not the death of Eric Gunner Eastman resulted in whole or in part from such negligence within the meaning of the Federal Employers' Liability Act."

ARGUMENT

The trial court properly set aside the verdict for appel- and entered judgment for appellee.

SUMMARY

I. The facts.

II. Comment upon certain matters contained in appellant's brief.

III. The deceased had been warned to stand clear of the dump car by each of the other three employees present at the time of the accident.

IV. As a matter of law, appellee was not guilty of actionable negligence towards the deceased.

I. The facts.

On October 16, 1952, the deceased was employed by appellee as a millman at appellee's yards in the city of Eugene, Oregon, and was assigned to work upon a flanger car then standing upon a repair track (Tr. 85-87). At the time in question, which was sometime between 8:15 and 9:00 A. M. (Tr. 73, 112), three other employees of appellee—Jerome Lambert, lead workman, and Austin E. Barker and Bruce MacGregor, carmen—were repairing a dump car which stood upon the same track as the flanger car and about two or three feet from it (Tr. 32, 49). These men were near the deceased when he was struck by the door of the dump car (Tr. 61, 77, 118), and it is to their testimony that we must look for the facts. Their testimony presents

ngle, consistent account of the accident, and is
ıout disagreement or conflict in any significant
.

Lambert, the lead workman, had come over to the
ıp car to assist in the repair of the dumping
hanism, since Carmen Barker and MacGregor were
ımiliar with it (Tr. 50, 75, 112). Upon arrival, he
ked around the defective car (Tr. 51, 113) in order
earch for the cause of trouble; at about this time,
ker shut off the air pressure to the car (Tr. 55, 77,
). Eastman had arrived on the scene (Tr. 112) and
standing with MacGregor some seven feet from
track and alongside the dump car (Tr. 115, 116).
Lambert proceeded under the car (Tr. 54, 76, 115)
rder to attempt to pry an arm of the dumping
hanism that it might be raised into a position which
ld allow operation of the door (Tr. 52-54, 116),
man stepped forward (Tr. 118). Lambert had
ned him (Tr. 60), Barker had told him to get back
of the way, that he might get hurt (Tr. 81), and
Gregor had told him to keep in the clear (Tr. 122).
though he was not assigned to any duties in con-
ion with the dump car, but was, in fact, assigned
ork elsewhere (Tr. 85-87), though he was but, at
, a visitor or "kibitzer" at the scene, he stepped
ard, just as Lambert, applying pressure to the arm

under the car, raised it into position. The arm straightened, and the side door or apron of the car dropped down, striking Eastman on the head (Tr. 54, 118).

II. Comment upon certain matters contained in appellant's brief.

1. The cardinal characteristic of this case, readily distinguishing it from nearly every authority upon which appellant has chosen to rely, is the want of conflict in the testimony of witnesses to the accident. The deceased was assigned to work elsewhere, but instead appeared at the point where the dump car was being repaired. Each one of the three whose duties required them to work upon the dump car warned the deceased. Nevertheless, the deceased, at a time when no amount of reasonable care by the other employees of defendant there present could have intervened to save him, moved forward to be struck by the dump car's falling door.

2. Appellee will not essay a case-by-case answer to appellant's authorities. The Federal Employers' Liability Act and the decisions thereunder are well known to both court and counsel. Suffice it to say that appellee has no quarrel with those many cases cited in appellant's brief in which liability of the defendant is bottomed upon breach of its recognized duty to instruct

, where appropriate, to warn about machinery *to sed by an employee in connection with his assigned es.* But by what logic is this duty extended beyond e assigned to work with such machinery so as to h, as well, all the other employees of a railroad ndant? Should the duty be so extended because of chance that one of those many might choose to by the scene of, for example, a machinery repair ation of no concern to him, and in the execution hich he has no assigned role or interest? Does a ing employee in such a case become, ipso facto, beneficiary of a railroad's duty to instruct him as e operation's details, or its attendant dangers, which n this case were obvious?

Similarly, appellee notes those cases cited by appellee rein a liability, found by the jury, is acknowledged he appellate court in the light of evidence which its of the possibility of railroad negligence. Surely, n a factual dispute, the jury must decide, and, ing other error, the appellate court must affirm. where, as here, each witness to the accident agrees every other, their testimony presenting a clear ure of a warned but careless man who, despite due , walked forward to his injury, that line of cases lving disputed factual situations is seen to be evant to appellant's cause.

Appellant has cited cases where a railroad defendant failed to warn an employee; that is not the instant case. Where these cases involve a question of want of warning to one assigned to work upon the machinery by which he is injured, their failure to support appellant is all the clearer.

3. There is no support in law for appellant's suggestions, as for example at page 38 of her brief, that the testimony of Deputy Coroner Kenneth Sutton amounted to substantive evidence of the accident's details. That official, not being present at the scene of the deceased's injury, could not testify for any purpose other than impeachment. The court (Tr. 128) prefaced Sutton's testimony with the statement that it was to be admitted

> "* * * solely for the purpose of impeachment and not for the purpose of any substantive evidence."

See *Woody v. Utah Power & Light Co.*, 10 Cir., 54 F. 2d 220, 223.

4. Appellant, by stating at page 7 of her brief that appellee failed "to show by any satisfactory evidence that Eastman had been fully advised of all of the dangers attendant at the time of the accident," apparently attempts to pass on to appellee that burden of proof

which has belonged to plaintiffs through several centuries of Anglo-American jurisprudence.

5. Appellant speaks, as at page 43 of her brief, of having called MacGregor, Lambert and Barker as "adverse party witnesses." In this connection, appellant, upon the trial, attempted to impeach MacGregor, her own witness (Tr. 126). Rule 43 (b), Federal Rules of Civil Procedure, 28 U.S.C.A., states that

> "A party may call an adverse party or an officer, director, or managing agent of a public or private corporation * * * which is an adverse party, and interrogate him by leading questions and contradict him and impeach him in all respects as if he had been called by the adverse party * * *"

The rule's requirement is certain; under its mandate, a party may call as an "adverse party witness" only an "officer, director, or managing agent" of an opposing party corporation. *Dowell, Inc. v. Jowers, et al.*, 5 Cir., 182 F. 2d 576, 581. Appellee believes, however, that the best statement of the rule's effect, and one which leaves the trial judge with appropriate discretion in the premises, is found in *Eckenrode v. Pennsylvania R. Co.*, 3 Cir., 164 F. 2d 996, aff'd. 335 U. S. 329, 69 S. Ct. 91, 93 L. Ed. 41, a suit against the railroad company under the Federal Employers' Liability Act by a widow, as administratrix, for damages resulting from her hus-

band's death. The trial judge permitted members of the train crew, which had been working with the deceased, to be examined as hostile witnesses. Stated the Court of Appeals at 164 F. 2d 999,

> "Neither we nor the appellee quarrel with that exercise of discretion. Such permission gives the plaintiff greater latitude in the examination of his witnesses and the plaintiff is not bound by their testimony * * * *But a belief that that testimony is false will not support an affirmative finding that the reverse of that testimony is true* * * * Plaintiff has the burden of establishing his case by direct or circumstantial evidence; that burden is not met by pointing to the fact that all the available witnesses are hostile and will not testify in a manner which would support the complaint." (Emphasis supplied)

Every witness is presumed to speak the truth, and MacGregor, Lambert and Barker are not barred from the benefit of that presumption by their status as railroad employees. Though appellant has indulged in speculation, as for example at page 39 of her brief, as to what happened, it is to the testimony of witnesses to the accident that we must look, without speculation, in order to determine the question of negligence. And if appellee by this test was guilty of no causative fault, then the action of the trial judge must be affirmed. For testimony adverse to appellant cannot be converted into testimony favoring her simply by labeling those who saw the accident "adverse party witnesses."

III. The deceased had been warned to stand clear of dump car by each of the other three employees pres- at the time of the accident.

The three separate warnings to deceased have eady been pointed out supra, and reference made their documentation in the transcript of testimony r. 60, 81, 122). The deceased, a long-time railroad ployee who had worked in the repair yards at Eugene at least eight or ten years (Tr. 26), was familiar h the nature of the accident scene as a repair track. nger was indicated by the open hook on the car or, by the other hook's having been burned off (Tr.), and by the door's gapping open at the top (Tr.), ready to fall. The deceased had no duties where stood, yet he did not leave. Even so, he was standing ide MacGregor and "well in the clear" of the car Lambert proceeded under it to apply pressure to the nping arm (Tr. 70). While working on the arm, nbert had to confront it, and thus turn his back ard the deceased (Tr. 59, 60). Then, for some reason own only to himself, Eastman stepped forward (Tr.) and was struck by the falling door. The danger s obvious, so obvious, perhaps, as to take away any y on the part of appellee to warn the deceased; *ndell v. Chicago, R. I. & P. R. Co.*, 7 Cir., 184 F. 2d , 871. Yet he was warned by three men. As he was

seen by lead workman Lambert in a place of safety (Tr. 70) when Lambert started under the car, Lambert had a right to assume that he would stay there; *Wendell v. Chicago, R. I. & P. R. Co.*, supra.

IV. As a matter of law, appellee was not guilty of actionable negligence towards the deceased.

It was, of course, Eastman's duty to exercise reasonable and ordinary care for his own safety, and appellee could, because of his long service, rely in some degree upon his so conducting himself. It is, therefore, not actionable negligence on the part of appellee railroad to fail to anticipate lack of such care; *Atlantic Coast Line R. Co. v. Dixon*, 5 Cir., 189 F. 2d 525, 527, cert. den. 342 U. S. 830, 72 S. Ct. 54, 96 L. Ed. 628. Further, in view of the warnings to deceased, appellant should, as a matter of law, have been barred from recovery; *Chicago, St. P., M. & O. R. Co. v. Arnold*, 8 Cir., 160 F. 2d 1002, 1006.

It is axiomatic that, under the Federal Employers' Liability Act, a plaintiff must establish negligence on the part of a railroad defendant in order to recover. The railroad is not subject to that degree of liability imposed by a workmen's compensation law, nor is the railroad an insurer of the safety of its employees; *Wolfe*

Henwood, 8 Cir., 162 F. 2d 998, 1001, cert. den. 332 S. 773, 68 S. Ct. 88, 92 L. Ed. 357.

In *Eckenrode v. Pennsylvania R. Co.*, supra, 3 Cir., F. 2d 996, aff'd. 335 U. S. 329, 69 S. Ct. 91, 93 Ed. 41, the deceased, a brakeman, effected a coupling ween an eighteen-car train and four loaded coal s, at which time power was applied in the engine l the train began its slow progress up a grade. Several es the wheels of the engine skidded and the engi- r each time closed the throttle in order to try again nove the train. Deceased walked past the engine ing this procedure, and exchanged a remark with engineer. He then was seen to walk along the track away from the engine, then to "diagonalize" back ard the train, and then to stoop and pick up some- ng from the ground. Suddenly, there was a fatal acci- t. The deceased's head had somehow been struck by lap and lead lever on the engine, a piece which shoots k and forth rapidly when the engine wheels skid ead of revolving in normal fashion. A verdict in or of plaintiff in the sum of $10,000 was set aside the trial court upon the basis of non-liability.

Bearing in mind that, in the instant case, Eastman not even assigned to work at the place where he injured, appellee would quote the following lan-

guage from the affirming opinion of the Court of Appeals at 164 F. 2d 999, 1000:

> "Out of this we cannot see a scintilla of evidence on which negligence can be found * * * We think that there was nothing in his conduct to give notice to the engineer of any possible danger involved in the situation * * *
>
> "The point we are making does not involve assumption of risk—that is out of this law. Neither does it involve contributory negligence * * * It has to do with the duty of Sunderlin, in charge of the operation of the engine, to take precautions against an experienced fellow member of his train crew acting in a wholly unexpectable and unreasonable fashion * * *
>
> "The brakeman, McGowan, saw Eckenrode stoop and apparently pick up something. Assuming that what he picked up was sand and McGowan should have recognized it, that would still leave no basis for finding negligence * * * Even if it may be inferred that he was trying to sand the tracks with it, it is too much to say that McGowan or other members of the train crew are to be charged with negligence in failing to anticipate this completely unexpectable operation on Eckenrode's part.
>
> "* * * so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist. It does not exist in this case."

And, upon further appeal, the United States Supreme Court affirmed, supra.

In the instant case, there are various allegations of ellee's negligence set out in the pre-trial order (Tr.); in every case, these allegations either failed of of upon the trial or else are phrased in terms of e duty which appellee, as a matter of law, did owe.

Nos. 1 and 2 disregard the fact that the door locks to be open in order for the door to be moved.

No. 3 failed of proof.

No. 4 attempted to impose an impracticable burden n appellee, and a duty not owed in law.

No. 5 failed of proof.

No. 6, as to deceased's location, failed of proof, and o appellee's actions, could not have been the proxi- e cause of the accident.

No. 7, insofar as it relates to actual duty of appellee, ed of proof.

No. 8 failed of proof.

Nos. 9 and 10 failed of proof in that no showing made that appellee, as a reasonable employer, uld have known of the nature of deceased's injury.

The trial judge, who heard the testimony and ob- ed the witnesses, simply could not allow a verdict

for appellant to stand. There was, in law, nothing upon which it could stand.

The United States Supreme Court, in *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479, 64 S. Ct. 232, 88 L. Ed. 239, discussed the law applicable to the direction of verdicts in the following language:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Appellee readily admits the propriety of having the jury decide a question of fact, given such a question to decide. But where, as here, there is simply no evidence that appellee did anything to bring about the accident, but only evidence of the warnings received by Eastman prior to the time he stepped forward from his place of safety, then appellee insists that but one course is proper, and that is the one which the trial court took in entering judgment for appellee.

CONCLUSION

There is yet to be a recovery in a case such as this ere there has not been at least some evidence of road negligence; indeed, there must be "more than intilla before the case may be properly left to the retion of the * * * jury." *Brady v. Southern Ry. Co.*, U. S. 476, 479, 64 S. Ct. 232, 88 L. Ed. 239. There ig no sufficient showing of a breach of any duty d by appellee to the deceased, the trial judge was *pelled* to enter judgment for appellee. Unless the uirement that a recovery under the Federal Em-ers' Liability Act be based upon railroad negligence be stripped of its plain meaning, that judgment t be affirmed.

Respectfully submitted,

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